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IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF NEW YORK, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND CLEAN AIR IMPLEMENTATION PROJECT RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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DISCLOSURE STATEMENT

The Alliance of Automobile Manufacturers ("the Alliance") is a non-profit, unincorporated organization of individual automobile manufacturers operating facilities in the United States. The Alliance has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary or affiliate that has issued shares or debt securities to the public.

The Clean Air Implementation Project ("CAIP") is a non-profit trade association whose member companies represent a broad cross-section of American industry. CAIP has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

TABLE OF CONTENTS

	Page
DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI	1
REASONS FOR SUPPORTING EPA'S AND UARG'S PETITIONS	1
CONCLUSION	9

APPENDIX

LETTER FROM KENNETH ENG, USEPA TO DALE CHOATE, MOBIL OIL CORPORATION (9/7/88)

MEM. FROM REICH, USEPA TO REGION VI ENFORCEMENT DIVISION DIRECTOR (10/3/78)

TABLE OF AUTHORITIES

FEDERAL CASES

BP America Production Co. v. Burton, No. 05-669, slip op. (U.S. Dec. 11, 2006) 7, 8

Bragdon v. Abbott, 524 U.S. 624 (1998) 4

Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) 6

Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001) 4

Lorillard v. Pons, 434 U.S. 575 (1978) 4

New York v. EPA, 443 F.3d 880 (D.C. Cir. 2006) 1, 8

TWA v. Hardison, 432 U.S. 63 (1977) 7

Young v. Community Nutrition Institute, 476 U.S. 974 (1986) 7

FEDERAL STATUTES

42 U.S.C. § 7401(b)(1) 6

42 U.S.C. § 7411(a)(4) 5

42 U.S.C. § 7470(3) 6

42 U.S.C. § 7501(4) 5

ADMINISTRATIVE MATERIALS

40 C.F.R. § 60.2(h) 7

36 Fed. Reg. 24,875 (Dec. 23, 1971) 6

39 Fed. Reg. 36,945 (Oct. 15, 1974) 6

MISCELLANEOUS

Letter From Kenneth Eng, USEPA to Dale Choate, Mobil Oil Corporation (9/7/88) 4

Mem. from Reich, USEPA to Region VI Enforcement Division Director (10/3/78) *available at* http://www.epa.gov/Region7/programs/artd/air/nsr/nsrmemos/m100378.pdf (last visited Dec. 15, 2006) 4

EPA-450/2-77-017a, Standards Support and Environmental Impact Statement Volume 1: Proposed Standards of Performance for Stationary Gas Turbines (Sept. 1977) *available at* http://nepis.epa.gov/pubtitle.htm (last updated Dec. 11, 2006) 3

EPA-450/2-78-006a, Electric Utility Steam Generating Background Information for Proposed Particulate Emission Standards (July 1978) *available at* http://nepis.epa.gov/pubtitle.htm (last updated Dec. 11, 2006) 4

EPA-450/3-85-025a, Calciners and Dryers in Mineral Industries: Background Information for Proposed Standards (Oct. 1985) *available at* http://nepis.epa.gov/pubtitle.htm (last updated Dec. 11, 2006) 4

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 12.6, the Alliance of Automobile Manufacturers ("the Alliance") and the Clean Air Implementation Project ("CAIP"), intervenors below, respectfully submit this response in support of the petitions for a writ of certiorari of the United States Environmental Protection Agency ("EPA") and the Utility Air Regulatory Group ("UARG") in *EPA v. State of New York*, No. 06-736, and *UARG v. State of New York*, No. 06-750, in which EPA and UARG seek review of the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) ("*New York II*").[1] This response is being submitted within 20 days of EPA's petition having been docketed on November 27, 2006 and UARG's petition having been docketed on November 29, 2006.

REASONS FOR SUPPORTING EPA's AND UARG's PETITIONS

Both EPA and UARG have filed petitions for a writ of certiorari seeking review of *New York II*. *See EPA v. State of New York*, No. 06-736 (U.S. filed Nov. 27, 2006) and *UARG v. State of New York*, No. 06-750 (U.S. filed Nov. 27, 2006).

The Alliance and CAIP were intervenors in *New York II*[2] and support both of these petitions for the reasons stated

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[1] EPA's petition seeks review of the second of two decisions rendered by the D.C. Circuit, both of which involved challenges to legislative rules promulgated by EPA and were styled *New York v. EPA*.

[2] Counsel has been authorized to state that this brief also represents the views of the American Chemistry Council, American Petroleum Institute, American Forest & Paper Association, National Petrochemical & Refiners Association, Corn Refiners Association, and the Portland

therein as well as due to the pervasive and negative effect that the ruling of the D.C. Circuit will have and is having on U.S. industry generally.

The Alliance and CAIP are concerned with the far-reaching implications of the Court of Appeals decision, which effectively would invalidate EPA's long-standing implementation of the modification element of the NSR program. Members of the Alliance and CAIP have extensive experience in the design, construction, and operation of industrial facilities and with the types of activities necessary for the safe, efficient and reliable operation of those facilities, as well as the historical application of the NSR program.

The petitions should be granted because the D.C. Circuit opinion, in failing to give deference to EPA's long-standing interpretation of the Clean Air Act and substituting its own analysis which conflicts with this Court's recent teaching on how similar language should be interpreted, threatens to play havoc with the normal, efficient operation of American industry. The D.C. Circuit's view could transform NSR from what is primarily an expensive, one time *new* source program - currently involving about 200 applications each year – into a program under which most of America's 22,000 existing major industrial plants repeatedly could trigger NSR analyses. Existing industrial facilities must undertake thousands of repair and replacement projects every year. If those activities allow the facility to operate more than in the recent past, the D.C. Circuit would conclude that they are "any physical changes" that could trigger NSR.

Cement Association, which participated in the proceedings below as members of the Equipment Replacement Rule Coalition, an intervenor in the proceedings.

This holding is contrary to how EPA has implemented its NSR program and how industrial plants operate on a daily basis. Industrial facilities are comprised of multiple pieces of equipment that work together in a variety of ways to produce usable goods, like cars. When investment is made in an industrial plant, it is anticipated that further investment and work will be required for it to serve the intended purposes of bringing particular goods to market.

As equipment is used, it is subject to wear and tear, just like a car or a house. As with cars and houses, it is expected that certain activities must occur to keep the plant operating safely, reliably and efficiently, while maintaining its existing, permitted capacity. It is just this type of activity that the D.C. Circuit decision could sweep into the concept of "change" with its newly-announced rule of statutory construction.

An example of the type of maintenance that the D.C. Circuit's opinion would classify as a "change" is the replacement of components of gas turbines used in industrial plants for power generation or natural gas pipelines. During the turbine's life, components like stator blades, turbine nozzles, buckets, fuel nozzles, seals, and packings are expected to be replaced. The D.C. Circuit's opinion would require an emissions *de minimis* analysis for each of these activities for them to be excluded as routine replacement even though EPA has recognized in issuing the New Source Performance Standards ("NSPS") for gas turbines that such activities are *not* changes that could trigger modification requirements.[3] Based on the D.C. Circuit's new rule of statutory construction, arguably all of these activities would

[3] *See* EPA-450/2-77-017a, Standards Support and Environmental Impact Statement Volume 1: Proposed Standards of Performance for Stationary Gas Turbines, 5-6 (Sept. 1977) *available at* http://nepis.epa.gov/pubtitle.htm (last updated Dec. 11, 2006).

be considered "any" changes that must be evaluated for purposes of NSR, notwithstanding EPA's prior determination (in 1977) that such activities are not changes. EPA has reached similar conclusions regarding major component replacements at other industrial facilities, including refineries.[4] Yet, the D.C. Circuit would effectively undo these determinations, of which Congress was clearly aware when it amended the Clean Air Act. *See Hall v. EPA*, 273 F.3d 1146, 1158 (9th Cir. 2001) (citing *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

As another example, the replacement of worn out bearings with new, improved versions may reduce the frequency of breakdowns in heavy equipment and corresponding unscheduled maintenance/repair. This, in turn, would enable a company to lengthen the periods between scheduled maintenance outages. Improved bearings do not change the capability of the equipment — *actual hourly emissions capability remains the same*. But they allow the process to operate more reliably (*i.e.*, with fewer equipment breakdowns) such that annual emissions could increase

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[4] *See, e.g.*, Letter From Kenneth Eng, USEPA to Dale Choate, Mobil Oil Corporation (9/7/88) ("[T]he replacement of the regenerator cyclone does constitute routine maintenance."); Mem. from Reich, USEPA to Region VI Enforcement Division Director (10/3/78) *available at* http://www.epa.gov/Region7/programs/artd/air/nsr/nsrmemos/m100378.pdf (last visited Dec. 15, 2006). ("Routine replacement means the routine replacement of parts, within the limitations of reconstruction."); *see also* EPA-450/2-78-006a, Electric Utility Steam Generating Background Information for Proposed Particulate Emission Standards, 5-4 (July 1978) *available at* http://nepis.epa.gov/pubtitle.htm (last updated Dec. 11, 2006), (Replacement of coal pulverizer does not trigger modification rule.); EPA-450/3-85-025a, Calciners and Dryers in Mineral Industries: Background Information for Proposed Standards, 5-2 (Oct. 1985) *available at* http://nepis.epa.gov/pubtitle.htm (last updated Dec. 11, 2006); (Examples of RMRR include the "replacement or refurbishing of components subject to high abrasion and impact.").

because the equipment can operate for longer periods between maintenance. If the equipment breaks down less often, it may be able to operate a few more hours, days or even a week a year depending on the equipment.

In the foregoing example, production would increase by increasing hours of operation, but without increasing the hourly emission rate or the actual hourly emissions capacity of a unit. On large equipment, emissions increases on an annual basis may well exceed a *de minimis* threshold and yet the D.C. Circuit opinion would consider such replacements to be "any" changes – after all the bearings are being *changed* – subjecting the project to a detailed analysis of whether such replacement is a modification of the equipment that could trigger NSR.

NSR is reserved for brand new facilities and existing facilities that undertake "physical *changes*" or "*changes* in the method of operation" that increase emissions. 42 U.S.C. §§ 7411(a)(4), 7501(4). In promulgating the rule at issue here, EPA answered a key question: What is a change? Implicit in this question is that there is a starting point against which to evaluate an activity. For without a starting point, it is impossible to know if a change will occur.

In the context of manufacturing plants, the relevant starting point can only be the existing plant as designed to operate over its lifetime. Plants are in a constant state of flux in response to market demand, changing consumer tastes for their goods, and wear and tear on production equipment. They are designed to operate in a flexible manner. The D.C. Circuit's opinion ignores this fact and puts manufacturing industry in a straightjacket of the most recent operations, ignoring the investment made in equipment and emissions controls when the plant was built. Such an approach is wholly arbitrary and unrelated to the goals of the NSR program to balance economic growth with environmental

reductions from new emitting capacity.[5] 42 U.S.C. § 7401(b)(1).

That Congress could not intend the broad construction the D.C. Circuit ascribes to the modification definition is also clear based on its practical consequences. If an activity triggers NSR permitting, the facility must apply for a permit and retrofit new source control technologies *before* implementing the activity. It may also need to conduct air quality modeling and purchase emission credits from another plant. The permitting process can take a year or more. If the activity is a necessary repair or replacement project, the result could be an extended shutdown of the facility until the project could be undertaken. Such an approach would represent a fundamental, drastic change in how industry operates, and would frustrate Congress' purposes of encouraging (not halting) economic growth.

Beginning in 1971, EPA issued regulations and guidance clarifying that a "change" does not include activities consistent with facility design.[6] Thus, "routine maintenance,

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[5] The purposes of PSD include balancing environmental progress and economic growth. 42 U.S.C. § 7470(3); *see also Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 866 (1984) ("We hold that the EPA's definition of the term 'source' is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth.").

[6] From the beginning of the NSPS program, EPA explained that, "in keeping with the intent of section 111 of controlling facilities only when they constitute a new source of emissions," the modification regulations were "limited to increases in actual emissions," which EPA defined in terms of "increased production capacity" (*not* increased hours of operation). 39 Fed. Reg. 36,945, 36,946-47 (Oct. 15, 1974); *see also* 36 Fed. Reg. 24,875, 24,876 (Dec. 23, 1971) ("Increases in production rates up to design capacity will not be considered a modification."); 39 Fed. Reg. at 36,947 (The modification rule is "sensitive to increased production capacity and ... automatically allow[s] increases in operating hours.").

repair, and replacement," "increase in the production rate, if such increase does not exceed the operating design capacity of the affected facility," "increase in the hours of operation," and "use of an alternative fuel or raw material if ... the affected facility is designed to accommodate such alternative use" are not "changes." 40 C.F.R. § 60.2(h); 36 Fed. Reg. at 24,877. The common denominator among these provisions is they reflect the contemplated normal operation consistent with how that unit was designed, constructed and permitted to operate.

Many of these activities increase emissions. For example, moving from one fuel to another would arguably constitute "any change" under the D.C. Circuit's construction and would clearly have the possibility of increasing emissions by more than a *de minimis* amount, *e.g.*, if a plant moves from gas to oil. Yet, all of these exclusions were in place when Congress amended the Clean Air Act, and Congress must be presumed to have known this fact. The D.C. Circuit opinion simply fails to explain how its view of the statute can be squared with these long-standing, congressionally-endorsed exclusions.[7]

Finally, the D.C. Circuit opinion is also contrary to this Court's recent opinion in *BP America Production Co. v. Burton*, No. 05-669, slip op. (U.S. Dec. 11, 2006), which stated:

> Petitioners contend that their broader interpretation of the statutory term "action" is supported by the reference to "*every* action for money damages" founded upon "*any* contract." 28 U.S.C. § 2415(a) (emphasis added). But the broad terms "every" and

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[7] *See* EPA Pet. at 16 (citing *TWA v. Hardison*, 432 U.S. 63, 76 n.11 (1977); *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 983 (1986)).

> "any" do not assist petitioners, as they do not broaden the ordinary meaning of the key term "action."

Id. at 7. This Court found that although the term "action" sometimes includes administrative actions, its ordinary usage is limited to judicial proceedings. In contrast, the D.C. Circuit held in this case that "when Congress places the word 'any' before a phrase with several common meanings, the statutory phrase encompasses each of those meanings" and the agency cannot pick among them, *i.e.*, cannot pick a narrow one over a broad one. *New York II*, 443 F.3d at 888. In *BP America*, this Court found the opposite, in fact, that notwithstanding the use of the word "any," the statute at issue *compelled* a more limited definition of the word action consistent with the statutory context, structure and purpose. Contrary to this Court's holding in *BP America*, the D.C. Circuit holds that the term "any" does in fact broaden the meaning of the word "change" and take it out of context from the normal manufacturing operations of a plant.

The Alliance and CAIP, therefore, agree with EPA and UARG that granting certiorari in this case is important to the proper administration of the Clean Air Act and the continued efficient and reliable operation of industry. Not only does the D.C. Circuit's erroneous new approach to statutory construction in *New York II* threaten "to put EPA into a regulatory straightjacket that Congress did not intend, with few if any options to tailor the program to changing conditions and policies," EPA Pet. at 21, it also threatens to hamstring American industry and prevent it from maintaining and repairing existing facilities. The "environmental benefits" the D.C. Circuit opinion would legislate are clearly outweighed by the risks of poorly operating facilities and the environmental costs of equipment that is not maintained and replaced as needed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Clean Air Implementation Project

December 18, 2006

APPENDIX

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region II
26 Federal Plaza
New York, New York 10278

Sep 7, 1988

Mobil Oil Corporation
Paulsboro Refinery
Paulsboro, New Jersey 08066

Attention: Mr. Dale E. Choate, Refinery Manager

Dear Mr. Choate:

This memorandum is written in response to your request dated February 26, 1988 concerning EPA's concurrence on the scheduled replacement of the regenerator cyclones in the Fluid Catalytic Cracking Unit (FCC), at the Paulsboro refinery. Additional information concerning this project was submitted to Mr. William J. O'Sullivan, Assistant Director of the New Jersey Department of Environmental Protection ("NJDEP"), on May 23, 1988.

EPA, Region II, has reviewed this information, together with the information provided in your February 26, 1988 submittal and has determined that the replacement of the regenerator cyclones does constitute routine maintenance. During this turnaround, repairs and replacement of FCC components at the Paulsboro refinery, are not considered modifications under §60.14(e)(1), therefore, this unit is not subject to New Source Performance Standards ("NSPS") for sulfur oxides ("SO_x").

If you have any further questions, please contact Jose A. Rodriguez at (212)-264-6686.

Sincerely,

/s/

Kenneth Eng, Chief
Air Compliance Branch

cc: W. O'Sullivan, Assistant Director
New Jersey Department of
Environmental Protection

ENVIRONMENTAL PROTECTION AGENCY

OCT 3, 1978

MEMORANDUM

Subject: PSD - Routine Maintenance Repair and Replacement

From: Director
Division of Stationary Source Enforcement

To: Howard G. Bergman, Director
Enforcement Division (6AE)
Region VI

This is in response to your memo of September 15, 1978, requesting an interpretation of the term "routine maintenance, repair and replacement" as it is used in §52.21(b)(2)(i). In particular you request guidance on what should be considered routine replacement. Routine replacement means the routine replacement of parts, within the limitations of reconstruction, and would not include the replacement of an entire facility (i.e., an old heater at a petrochemical plant which has ended its normal useful life.

If you have any further questions, please contact Libby Scopino at FTS 755-2564.

/s/

Edward E. Reich

cc: Mike Trutna
Peter Wyckoff